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(1)

Supreme Court, U.S.
FILED

JUL 17 1989

JOSEPH F. SPANGL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

No _____

October Term, 1989

Rochelle Konits,

Petitioner,

v

The People of the State of New York,

Respondents.

Petition for a Writ of
Certiorari to the Supreme Court of
the State of New York, Appellate
Division, Second Judicial
Department.

Ronald Podolsky
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New York, N.Y. 10038

(212) 460-8218



I. QUESTIONS PRESENTED

Is there a denial of due process of law under the 5th, 6th and 14th Amendments when a trial judge who is aware of a defendant's dispute with defense counsel respecting the defendant's desire to testify in her own behalf, urges that defendant to follow her counsel's advice not to testify, which advice is then followed, and the defendant is convicted.

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-II. Parties

Rochelle Konits, Petitioner,
The People of the State of New
York, Respondents.



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Office Division of
Federal Bureau of Investigation
Washington, D. C.
1900

III. Authorities cited:

<u>Carter v Illinois</u> , 329 US 173	18
<u>People v Baker</u> , 28 AD2d 24, rev other gnds 23 NY2d 307	18
<u>People v DeJesus</u> , 42 NY2d 519	20
<u>Poe v United States</u> , 233 F.Supp	18
193 (Dist C. D.C. 1964) affd 352 F2d 639.	18
<u>Richards v United States</u> , 318 F2d 639 (9th Cir. 1963)	17, 18
<u>United States Constitution</u>	
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IV. Opinions Below.

The People of the State of New York, Appellate Division, Second Department, ____AD2d____ (1989) reproduced at A1.

V. Jurisdictional Statement.

Jurisdiction is conferred by reason of 28 USC 1254 in that it is alleged that the Petitioner was deprived of due process of law in a criminal conviction procured by the state in violation of the due process of law requirements and right to counsel requirements of the



United States Constitution.

Petitioner was convicted after a jury trial in Nassau County Court, of the felony of criminal possession of a controlled substance in the 5th degree, and misdemeanor charges of violation of the Public Health Law and of conspiracy. On December 5 1985, she was sentenced to five years probation.

The judgment was affirmed in the Supreme Court, State of New York, Appellate Division, Second Department on March 12, 1990 (A1). Leave to Appeal to the Court of Appeals was denied on May 25, 1990. The issue herein raised was argued



in the Supreme Court, State of New York, Appellate Division, Second Judicial Department, and was also urged upon the New York Court of Appeals in the application for leave to appeal, which application was denied May 25, 1990.

VI. Constitution and Statutes Cited:

United States Constitution

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be



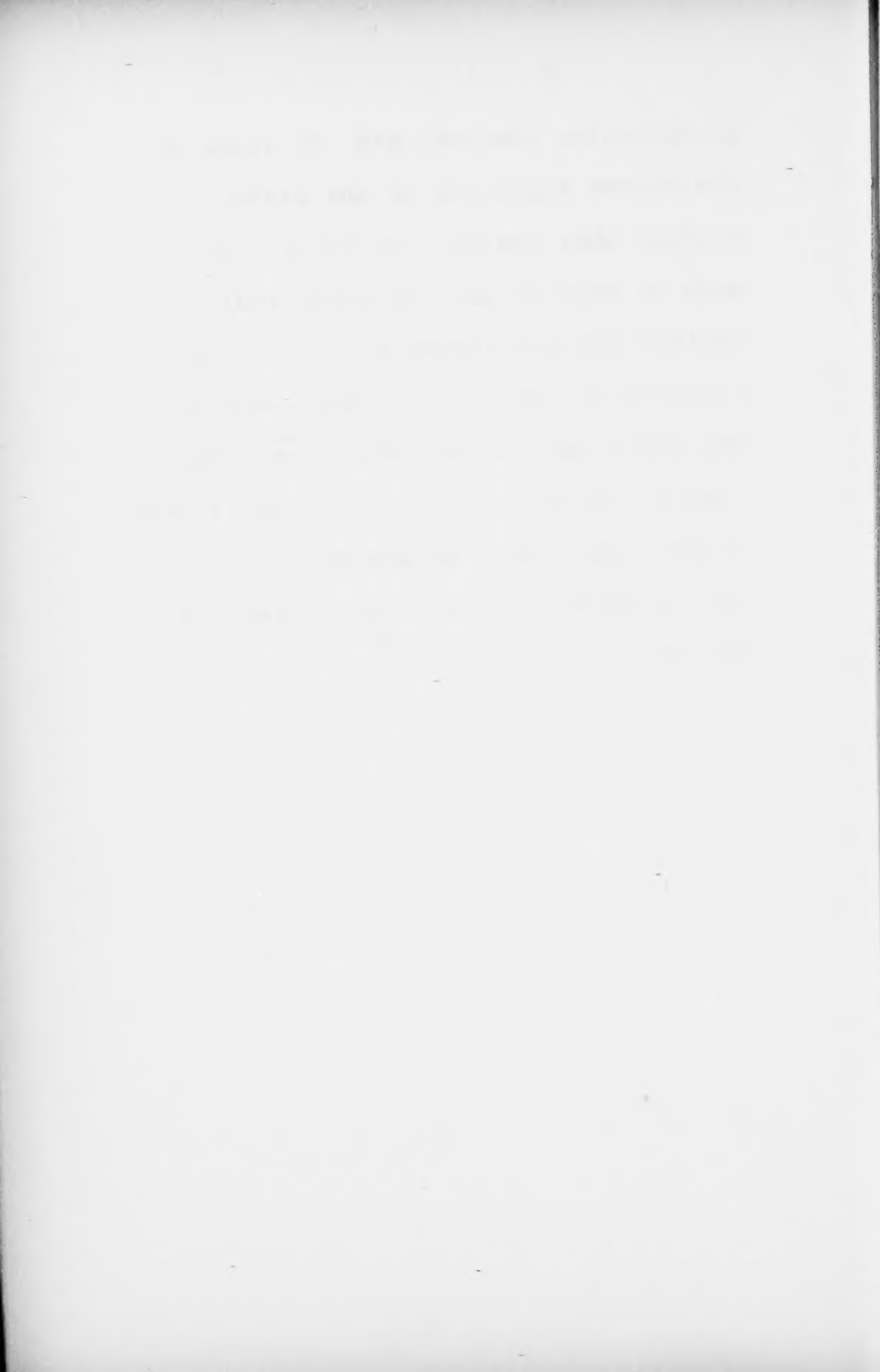
deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14th Amendment: Section 1. All persons born or naturalized in the United States and subject to the



jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



VII. STATEMENT OF THE CASE

On December 5, 1985 the Petitioner, a medical doctor, was convicted in Nassau County Court, New York, of the felony of criminal sale of a controlled substance in the fifth degree and misdemeanor charges of conspiracy, and violations of the Public Health Law, and was sentenced to five years probation. The sole issue presented here concerns whether the procedure followed by the trial court during the trial violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

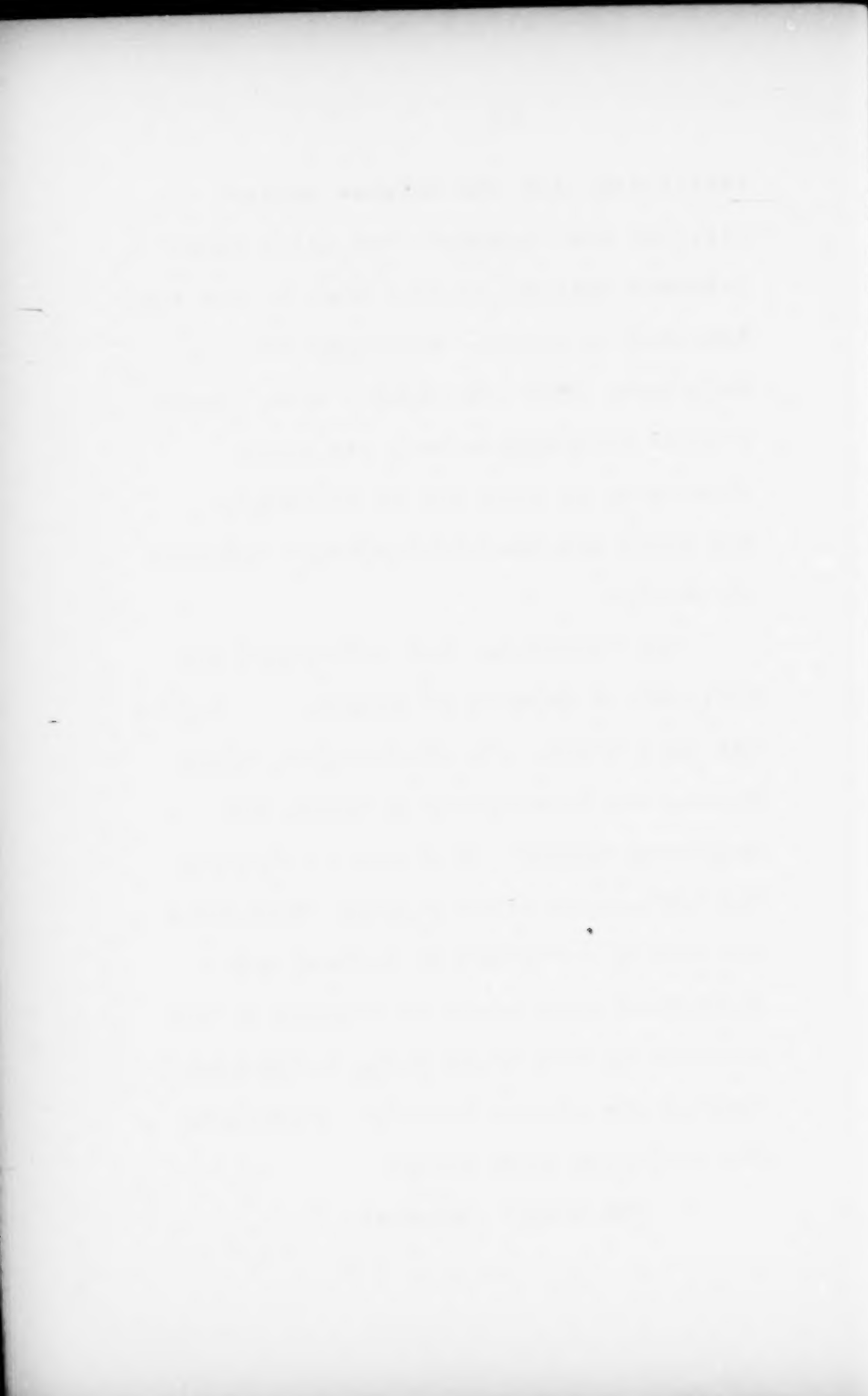
The record reveals that there was a ongoing dispute between the Petitioner and her defense counsel respecting whether or not she should testify in her own defense. During the pretrial hearing respecting the admissability of certain evidence, the Petitioner insisted on



testifying, and the defense counsel resisted that request. The trial court informed defense counsel that it was the defendant's choice, whereupon the Petitioner took the stand. When counsel refused to question her, the court threatened to hold him in contempt, whereupon she testified without further incident.

The Petitioner had interposed the affirmative defense of duress. During the jury trial, the prosecution, after presenting documentary evidence and testimony rested. A motion to dismiss for failure to prove a prima facie case was denied. Thereafter counsel and petitioner were again in dispute in the presence of the trial judge respecting whether she should testify. Whereupon the following took place:

THE COURT: However, I



would finally, once again, in conclusion to urge you in the strongest terms possible to listen to, consider, and, indeed follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following counsel's advice. I just wanted for the record to be known that I consider the People's alleged addicts to be on parole, totally with personal motives. *****
(T879)

THE COURT: *** I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not to testify.***

The trial then went forward without the testimony of the Petitioner. The defense counsel withdrew the affirmative defense of duress theretofore pleaded. (A7) Thereafter the Petitioner was convicted of all counts considered by the jury. On December 5, 1985 she was sentenced to five years probation which she is still serving. The Supreme Court of the State of New York, Appellate Division, Second Department affirmed the judgment of conviction.



The Court of Appeals denied leave to appeal on May 25, 1990. The issue of whether the statement of the trial judge was a violation of the United States Constitution was raised in the Supreme Court, Appellate Division.



VIII. Reasons For Granting the Writ.

The trial court improperly became a partisan in support of a defense attorney who was in an ongoing dispute with the client respecting the client's decision to testify in her own defense at her trial. This action by the court presents a violation of the Sixth Amendment and due process component of the 14th Amendment to the United States Constitution. The court action rendered Petitioner's final decision not to testify one based on coercion and deprivation of free will. It unfairly left prosecution evidence uncontradicted, and deprived her of the defense of duress, and lack of intent, all in violation of the due process component of the Sixth and Fourteenth Amendments.

The desire of the Petitioner to testify in her own defense, and the



court's knowledge thereof predated the trial. At a pre-trial hearing respecting the admissability of certain statements, a dispute arose between Petitioner and defense counsel respecting her desire testify. At that stage, the court intervened and informed the defense counsel that the choice was that of the petitioner. When she took the stand and defense counsel refused to question her, the court threatened counsel with contempt, whereupon, the testimony of the Petitioner was received.

At the trial, the prosecution rested. There existed uncontradicted testimony of the prosecution witnesses. The court denied a motion to dismiss for failure to prove a prima facia case.

The Petitioner insisted on testifying in her own defense, and once again defense counsel advised her in the



presence of the trial judge not to do so.

Whereupon the following transpired:

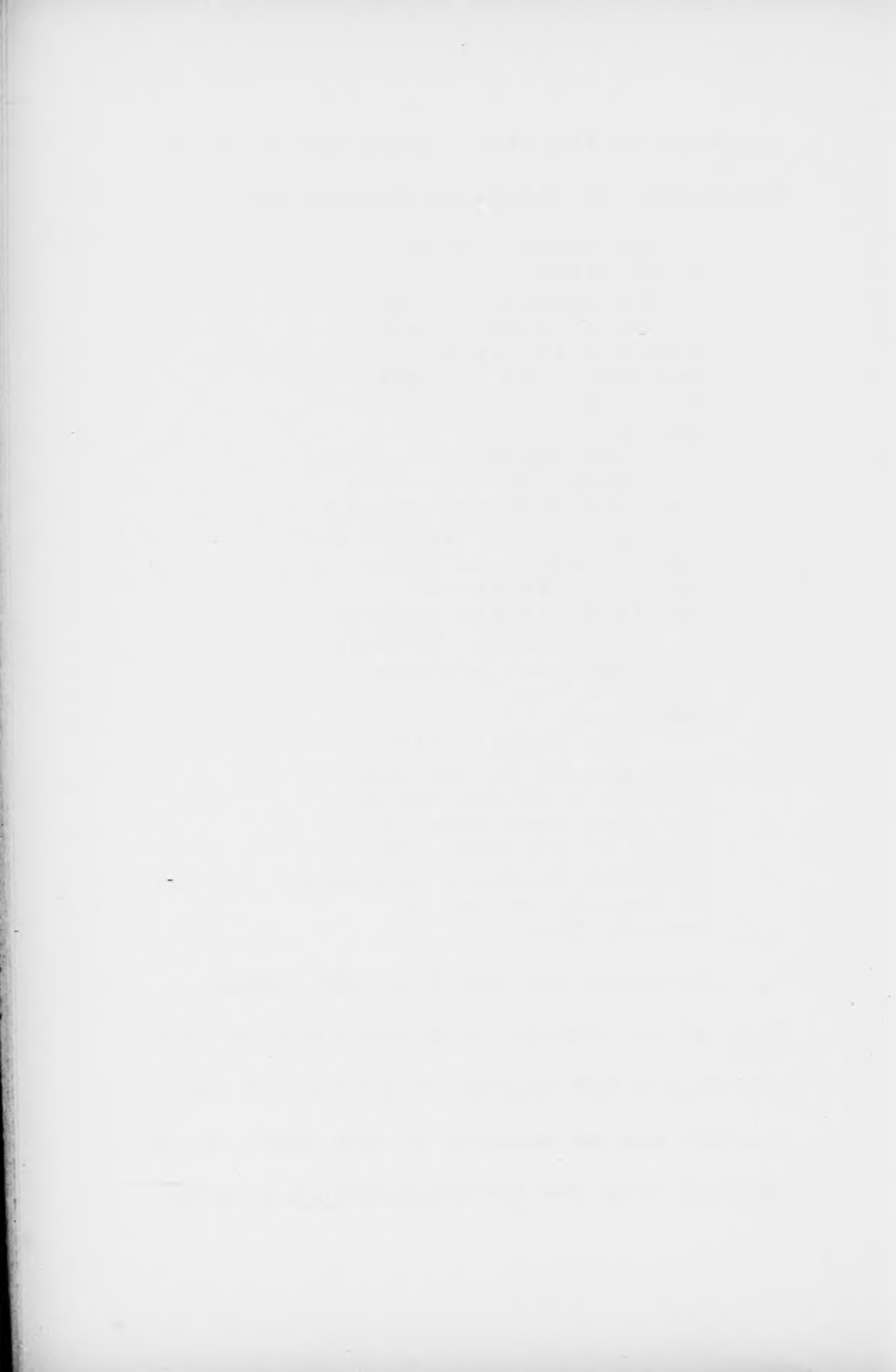
THE COURT: However, I would finally, once again, in conclusion urge you in the strongest terms possible to listen to, consider, and, indeed follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following counsel's advice. I just wanted for the record to be known that I consider the People's alleged addicts to be on parole, totally with personal motives.

(T879)

THE COURT: *** I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not to testify.***

Although the decision was indeed that of Dr. Konits, the court's view that she follow her counsel's advice not to testify was an opinion of the court which entered into the decision making process,



in violation of the Sixth and Fourteenth Amendment right to counsel and to due process of law.

The advice of the court to Dr. Konits to follow her attorney's advice and not to testify left the prosecution testimony, uncontradicted. The advice of the court to waive an important constitutional right to testify was made when it knew full well that just prior thereto it had denied the defense motion to dismiss the charges by ruling that the People had established a prima facie case.

When the court advised Dr. Konits to follow her counsel's advice not to testify, it became a partisan in the issue by lending its considerable prestige to the opposing views of defense counsel which she was so steadfastly resisting. This action of the court



deprived Dr. Konits of free will and knowing waiver. All opposition to counsel's advice collapsed to her prejudice due to the opinion of the court entering the balance. This is reversible error, in that the court was not authorized to give such advice to Dr. Konits in this important matter. See: Richards v United States, 318 F2d 639 (9th Cir. 1963). The court's only legitimate action in this respect was to caution a Dr. Konits to consider very carefully counsel's advice. Under no circumstances could the judge, who is the officer of the state advise a defendant in a criminal case to waive an important constitutional right. The duty of the court after the caution clearly is to remain neutral and offer no personal opinion as to the correct course of action to take.



The fact that a defendant in a criminal matter is represented by counsel does not mean that the defendant is powerless to adopt the course that the defendant believes will best to produce the most desirable outcome. The defendant is the final arbiter of the conduct of his defense. Carter v Illinois, 329 U.S. 173, 174; Peo. v Baker, 28 AD2d 24, 26, rev'd other grounds 23 NY2d 307.

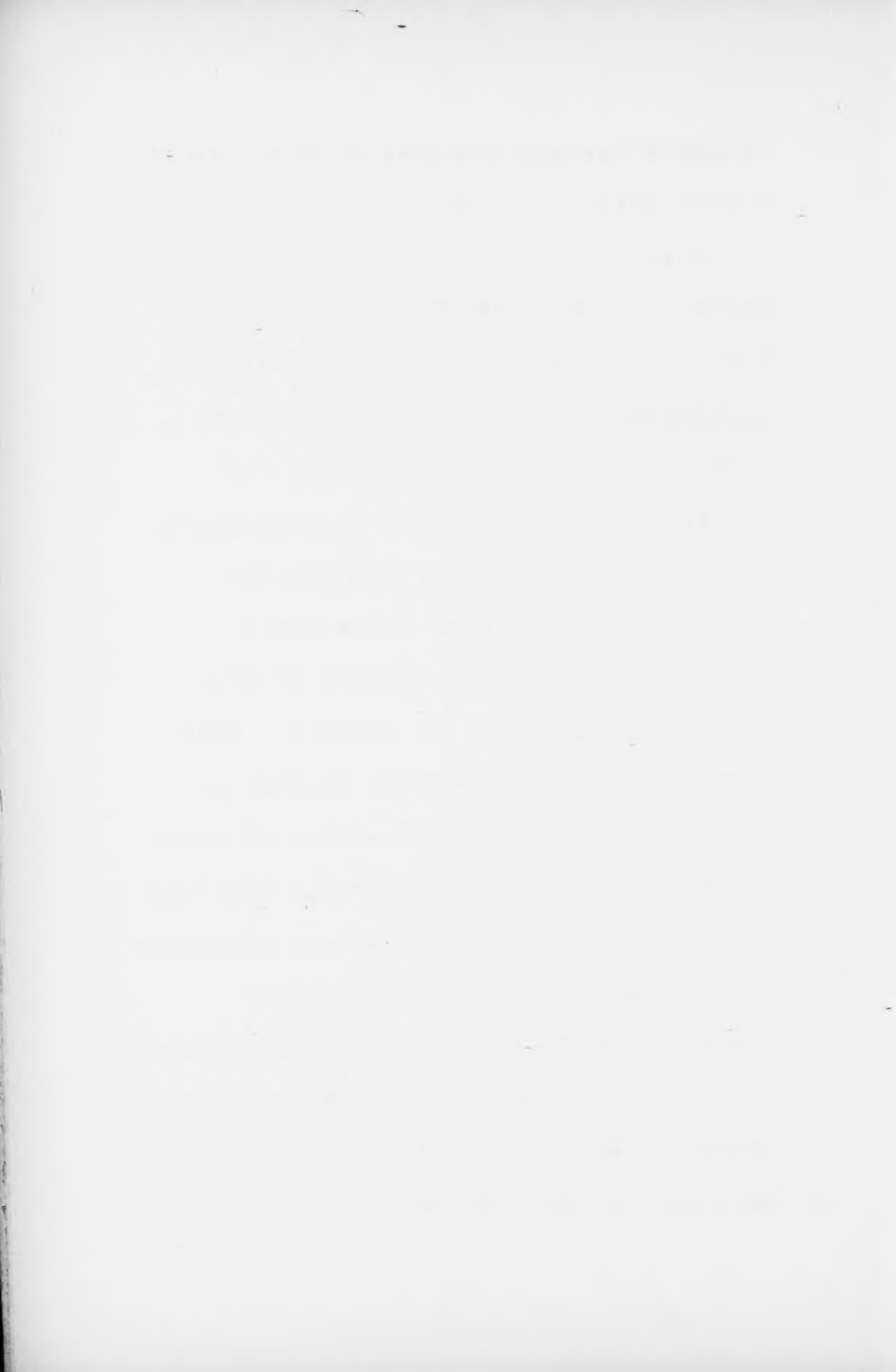
In Richards v United States, supra, reversible error committed when court advised defendant to testify in face of uncontradicted prosecution testimony, thereby enabling the prosecutor to bring in defendant's prior convictions of violation of the same statute, of which convictions the court was unaware. In Poe v United States, 233 F Supp 193, (Dist Ct. D.C. 1964) aff'd 352 F2d 639,



640, the Court did not caution defendant who was in the process of waiving his right to testify when the court was aware that the defense attorney's advice to waive the right to testify was predicated upon a misapprehension of the rules of evidence respecting permitted use of prior defendant statements.

What the court did here differs from cautioning a defendant to consider very carefully the attorney's advice before making the decision which is solely the defendant's to make. Advising a defendant to follow the attorney's advice presents a grave misuse of the omnipresent and awesome power of the court. It brings to bear upon the defendant's decision the opinion of the judge. Inappropriate remarks which might throw the scales out of balance should be scrupulously avoided. Care must be taken

to guard against the possibility that the stated opinion of the trial judge or even the suggestion of an opinion may prove decisive in a decision making process making that decision unfair. See: Peo. v DeJesus, 42 NY2d 519. In this case that misuse of power led to the deprivation of an important Fourteenth & 5th Amendment right to due process. It cannot be said that there was a knowing and uncoerced waiver of the constitutional right to testify. What the court did presented an exceedingly unfair exercise of its position of power and influence. It gratuitously bestowed upon the prosecution the unfair advantage of leaving its proffered testimony uncontradicted, and led to the withdrawal of the defense of duress. As The trial judge was an officer of the state and the partisan and prejudicial advice given to



Dr. Konits was violation of the United States Constitution, Sixth Amendment right to counsel which must be secure from state intrusion.

IX. CONCLUSION: The writ should be granted.

July 13, 1990.

Respectfully Submitted,

Ronald Podolsky

Attorney for Petitioner.



Appendix

Captions Below

Supreme Court of the State of New York
Appellate Division: Second Department

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

-against-

Rochelle Konits,

Defendant-Appellant.

County Court Nassau County
State of New York

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Rochelle Konits,

Defendant.

Indictment No. 60664/85

Ai

State of New York Court of Appeals

BEFORE: HON. STEWART F. HANCOCK, JR., Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

against

CERTIFICATE

DENYING

LEAVE

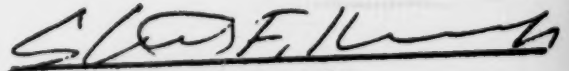
ROCHELLE KONITS

Appellant

I, STEWART F. HANCOCK, JR., Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Manlius, New York

May 25, 19 90



Associate Judge

*Description of Order: Order of the Appellate Division, Second Department of March 12, 1990 affirming a judgment of County Court, Nassau County rendered March 28, 1986

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Order of Appellate Division

Sybil Hart Kooper, J.P.

Stanley Harwood

Vincent R Balledda, Jr.

Sandra Miller, jj.

Supreme Court of the State of New York
Appellate Division Second Judicial
Department.

1983E The People etc. respondent v
Rochelle Konits, Appellant. (Ind No
60664)

Ronald Podolsky, New York, N.Y. for
appellant. Dennis Dillon, District
Attorney, Mineola, NY. (Bruce E. Whitney
and John F. McGlynn of counsel), for
respondent.

Appeal by the defendant from a
judgment of the County Court, Nassau
County, (Harrington, J.) rendered March



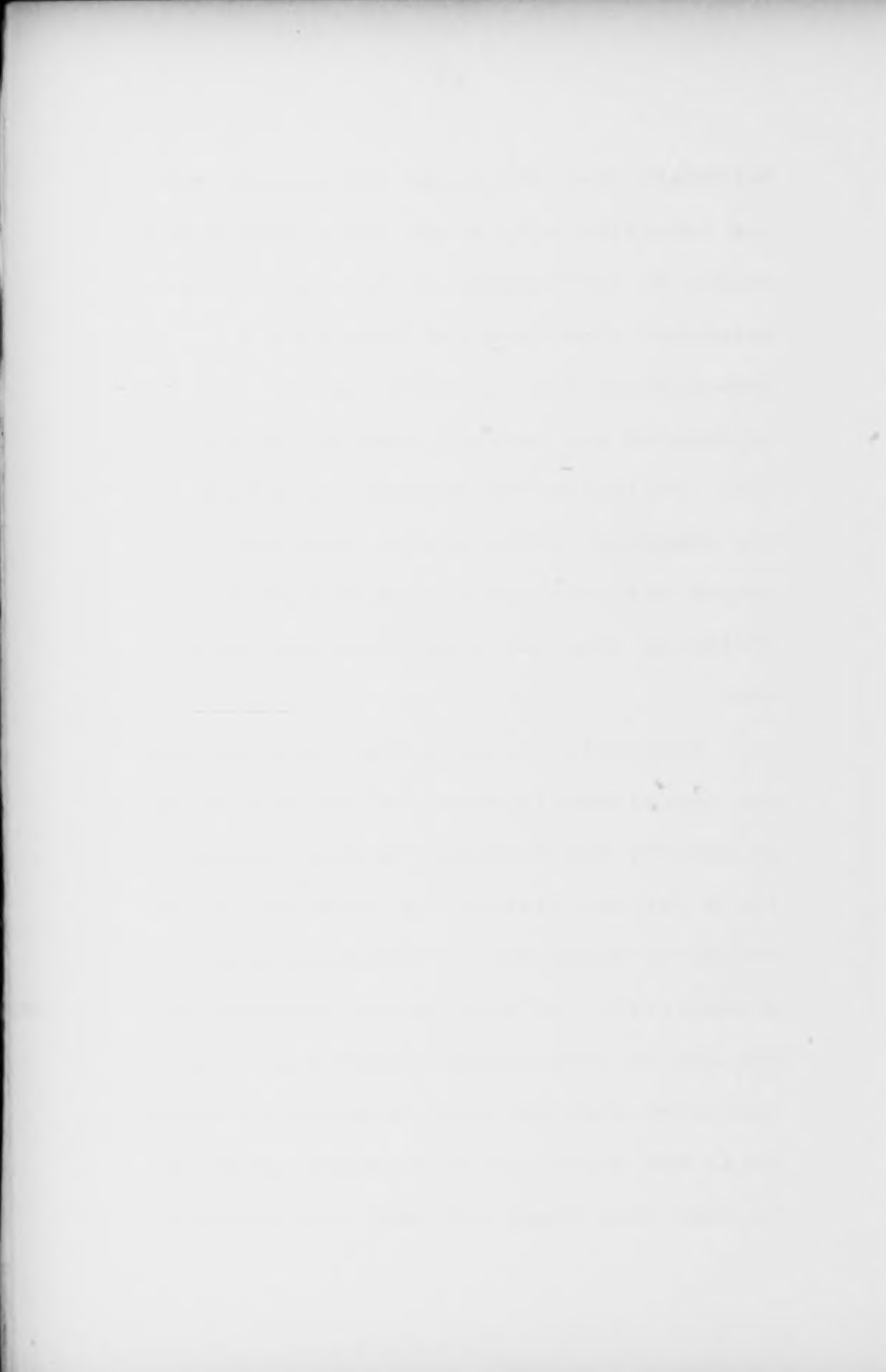
28, 1986, convicting her of conspiracy in the fifth degree, criminal possession of a controlled substance in the fifth degree, criminal possession of a hypodermic instrument and violation of Public Health law Secs. 3335(1) and 3381(1), upon a jury verdict and imposing sentence.

Ordered that the judgment is affirmed. In this very bizarre case, the defendant, a physician, attempted to have one of her patients drug, kidnap and bring to her office another physician so that the defendant could engage in sex with him. In return for this, the defendant offered to provide her patient with illegal drugs. After this proposition was reported to the police, the defendant repeated the offer to her patient and a police informant. That conversation was recorded. The



defendant then furnished the patient and the informant with drugs and a hypodermic needle in furtherance of her plan. The defendant also gave the informant a prescription for valium without performing any medical examination upon him. Following the defendant's arrest, she admitted to the police that she wanted the intended victim brought to her office so that she might have sex with him.

Initially, we note that the court did not improvidently exercise its discretion in denying the defendant's application for a further examination pursuant to CPL 730.30 to ascertain her competency to stand trial. An examination pursuant to CPL 730.30 only months before the trial indicated that she was competent to stand trial and there was no evidence proffered to show that there had been any change in



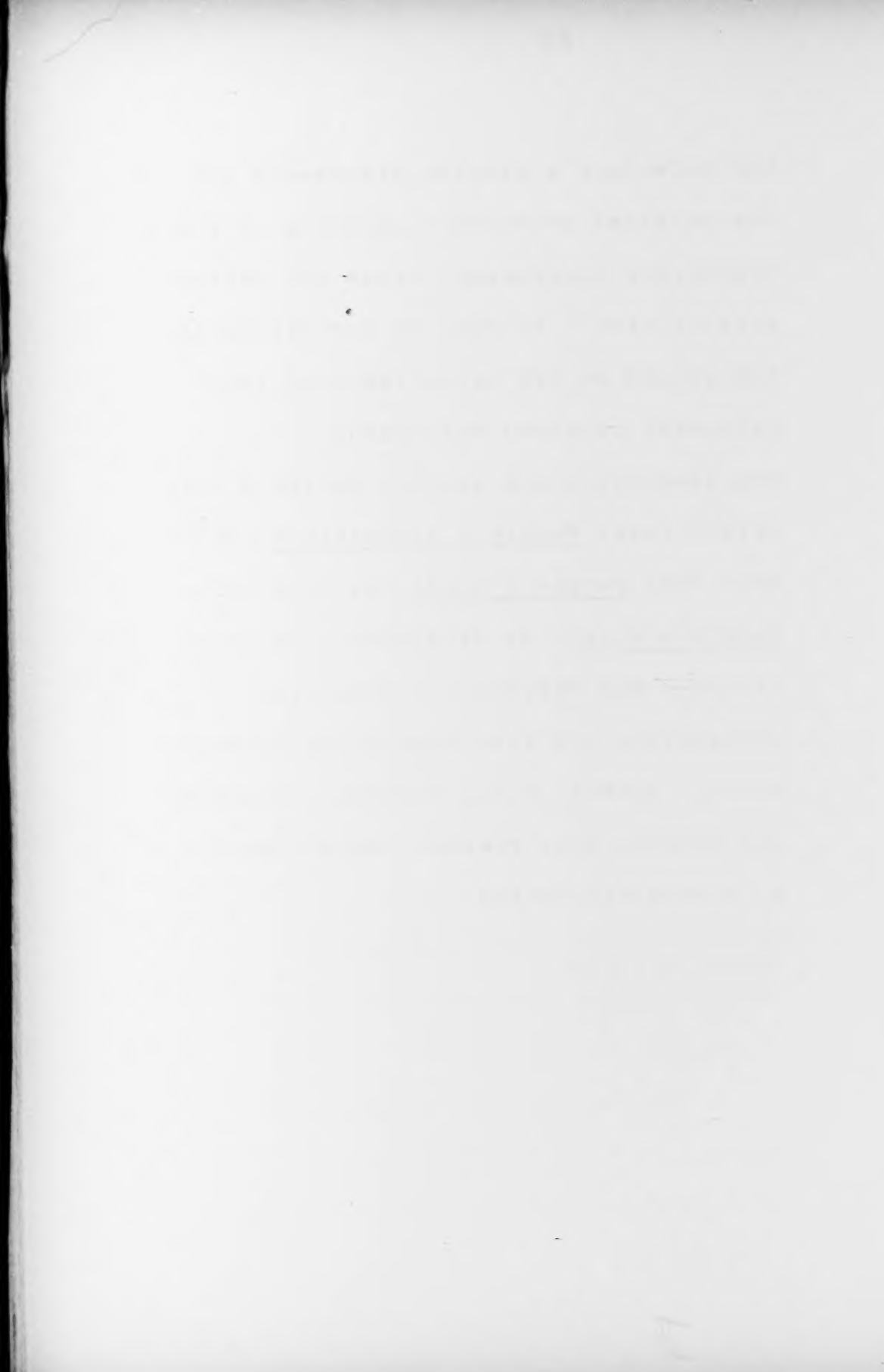
circumstances which would have necessitated a second examination.

(See, People v Gensler, 72 NY2d 239, cert denied, --- US ---, 109 S Ct 323; People v Kestin, 134 AD2d 453; People v Cox, 93 Ad2d 946).

We reject the defendant's argument that she was denied her constitutional right to a fair trial by virtue of ineffective assistance of trial counsel. The record reveals that trial counsel proceeded as effectively as possible in light of the overwhelming evidence of the defendant's guilt. He made numerous pretrial motions and obtained pretrial hearings, vigorously cross-examined the People's witnesses, and stressed unreliability and inconsistencies in their testimony. He further presented an aggressive opening and summation and proceeded as well as possible in light to

the defendant's damning statements and the physical evidence consisting of the hypodermic instrument, drugs and valium prescription. In sum, on our review of the record we are satisfied that the defendant received meaningful representation and was not denied a fair trial. (see, People v Satterfield, 66 NY2d 796; People v Baldi, 54 NY2d 137; People v Aiken, 45 NY2d 394). We have reviewed the defendant's remaining contentions and find them to be without merit. KOOPER, J.P., HARWOOD, BALLETTA and MILLER, JJ., concur. Enter: Martin H. Brownstein, Clerk.

Z
March 12, 1990



Trial Transcript excerpts

pp. 878-879

THE COURT: However, I would finally, once again, in conclusion to urge you in the strongest terms possible to listen to, consider, and, indeed follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following counsel's advice. I just wanted for the record to be known that I consider the People's alleged addicts to be on parole, totally with personal motives. *****
(T879)

THE COURT: *** I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not to testify.***

UNITED STATES OF AMERICA

FROM 1776 TO 1863

BY

JOHN P. KENNEDY

OF THE

UNIVERSITY OF CHICAGO

AND

OF THE

AMERICAN HISTORICAL ASSOCIATION

NEW YORK

1863

THE

AMERICAN HISTORICAL ASSOCIATION

OF THE

UNITED STATES OF AMERICA

p. 986.

THE COURT: Do you have any motions at the conclusion of the entire case, Mr. Wolfe?

MR. WOLFE [defense Counsel] Yes, your honor First, May I please with the Court's permission withdraw my previous request that the Court charge specifically with regard to the matter of the affirmative defense of duress. I urge the Court to allow me to withdraw that application.

THE COURT: All right. That will be granted.

(2)
No. 90-286

Supreme Court U.S.

FILED

SEP 28 1990

JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

October Term, 1990

ROCHELLE KONITS,

Petitioner

VS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court
of the State of New York, Appellate Division,
Second Judicial Department

BRIEF FOR RESPONDENT

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Assistant District Attorneys
Of Counsel

BEST AVAILABLE COPY

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<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	5, 6, 7
<i>Malloy v. Hogan</i> , 378 U.S. 1 (1964)	5, 6

Rules Cited:

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Statutes Cited:

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New York Penal Law §220.06	2
New York Penal Law §220.45	2
New York Public Health Law §3335	2
New York Public Health Law §3381	2

United States Constitution Cited:

Fifth Amendment	6
Sixth Amendment	5, 6

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROCHELLE KONITS,

Petitioner,

-
vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

**On Petition for a Writ of Certiorari to the Supreme
Court of the State of New York, Appellate Division,
Second Judicial Department**

BRIEF FOR RESPONDENT

**OPINIONS BELOW AND
STATEMENT OF JURISDICTION**

Petitioner has sufficiently set forth the opinions of the court below. The basis upon which certiorari jurisdiction is asserted is adequately stated.

Statement of the Case

Petitioner was tried on an indictment charging her with the crimes of conspiracy in the fifth degree (New York Penal Law §105.05), criminal possession of a controlled substance in the fifth degree (New York Penal Law §220.06), criminal possession of a hypodermic instrument (New York Penal Law §220.45), and with violating sections 3335 and 3381 of the New York Public Health Law. When respondent had concluded the presentation of its case, it became apparent that petitioner disagreed with defense counsel regarding the presentation of the defense case. The disagreement, as herein relevant, centered on whether or not petitioner should testify in her own defense. Petitioner wished to do so but defense counsel recommended against it. After it had been told of the disagreement, the trial court, outside the presence of the jury, addressed the question of whether or not petitioner should testify:

THE COURT: As I have indicated on prior occasions, you as the defendant have the right to testify. You as the defendant have the right under our law to make that decision as to whether or not to testify.

Your attorney has indicated that his very best professional judgment is that you should not testify --

PETITIONER: Many cases have been lost, sir, because the defendant didn't open their mouths.

THE COURT: Excuse me. I would urge you to give full consideration to Mr. Wolfe's advice.

Again I should point out to you, that depending of course, on what your testimony will be it might open

doors to other testimony concerning your prior conduct, other conduct that you have engaged in --

PETITIONER: Alleged.

THE COURT: -- and, further, the prosecutor would have the right to cross-examine you and make inquiry of you concerning various types of conduct certainly involved in this or these incidents between August 5th and 15th, 1984, as well as and in addition to other conduct that you might have involved yourself in and the jury, of course, will hear all of that.

You mentioned that there have been a lot of cases where defendants have been convicted because they never said anything themselves. I would also want to indicate to you that based on my experience there have also been many, many defendants who have been convicted after they have testified and after they have been cross-examined and jurors [sic] certainly have on many, many occasions convicted such defendants.

PETITIONER: Sir, I --

THE COURT: The determination --

PETITIONER: Yes, I do understand you.

THE COURT: The determination, as indicated earlier on this issue, is yours.

PETITIONER: Sir, I do understand.

THE COURT: However, I would finally, once again, in conclusion, urge you in the strongest terms possible to

listen to, consider and, indeed, follow your counsel's advice.

PETITIONER: Then I'll tell you, sir, I'm not following my counsel's advice. I just wanted for the record to be known that I consider the People's alleged drug addicts to be on parole, totally with personal motives. You know, prior testimony -- total personal motives. That's on the record.

The second thing is that any time I have issued anything to any drug addict, right, or alleged drug addict, it has always been for the purpose of preventing an extremely high blood pressure, preventing -- the Valium slows down the --

THE COURT: I'm really not interested in your testimony. That decision again is up to you. I just wanted to make you aware of what might or might not happen, the results or implications of your testifying.

I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not testify.

All right, since there are witnesses available at this time it would seem appropriate that we should proceed.

DEFENSE COUNSEL: Your Honor, let me inquire about the scope of your advice to the doctor.
Certainly --

THE COURT: Excuse me, I have attempted and I have been as careful as I could in not giving any advice to anyone here.

(T. 876-879). A short time later, when counsel advised the trial court that petitioner had indicated to him that she would not testify, the trial court was advised by petitioner that she was thinking the matter over but had not made a decision (T. 882). Following a recess and testimony from petitioner's character witnesses, defense counsel rested. Before going further, the trial court excused the jury for its luncheon break and, in its absence, inquired of petitioner whether or not she was going to testify. Petitioner responded unequivocally, "No, sir, I'm not going to testify" (T. 935).

Summary of Argument

Petitioner's sixth amendment rights were not violated when the trial court intervened in a dispute between petitioner and her attorney over whether or not she should testify in her own behalf. The decision over whether or not to testify in her own behalf is reserved to a defendant. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Usually, a defendant and her counsel concur in whether defendant should testify. Here, petitioner wished to testify and her counsel disagreed. In light of this serious conflict, the trial court properly intervened pursuant to its broad power to take affirmative action to protect the rights of a criminal defendant. *Glasser v. United States*, 315 U.S. 60, 71 (1942).

The trial court's intervention was a balanced attempt to assure that petitioner had the knowledge and facts necessary to make an intelligent decision whether or not to testify. At the same time, the trial court urged petitioner to consider the advice of her attorney. At all times the trial court made it clear that in the final analysis the decision whether or not to testify was petitioner's and petitioner's alone. By no means was she denied the right to be the final arbiter of her defense and she was not deprived of her sixth amendment rights.

Argument

The Petition for a Writ of Certiorari Should Be Denied

Petitioner contends that she was deprived of her sixth amendment right to counsel. Specifically, petitioner contends that "the trial court improperly became a partisan in support of a defense attorney who was in an ongoing dispute with the client respecting the client's decision to testify in her own defense at her trial." She is wrong. "A petition for a writ of certiorari will be granted *only* when there are special and important reasons therefor." Rules of the Supreme Court, Rule 10.1 (emphasis added). In her petition, petitioner has not demonstrated that there are special and important reasons for review of this case. This is not surprising because the principles of law applicable to the instant situation are well settled. Moreover, the significance of their application to the instant controversy does not extend beyond the interest of the immediate litigants. Thus, this Court should deny the petition for certiorari.

In any event, petitioner's claim fails on the merits. The sixth amendment right to counsel does not deprive a defendant of the right to be the final arbiter of her defense. *Farretta v. California*, 422 U.S. 806 (1975); *Carter v. Illinois*, 329 U.S. 173 (1946). Indeed, the decision over whether or not to testify in one's own behalf is reserved to the defendant, who has the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Ordinarily, a defendant and her counsel concur in whether the defendant should testify. Here, this was not the case. After the completion of the state's case, the court became aware that petitioner wanted to testify in her own behalf and defense counsel did not want her to so testify. Given this serious conflict, which, unless properly resolved, posed a clear threat to the petitioner's fifth and/or sixth amendment rights,

the trial court properly intervened pursuant to its broad power to take affirmative action to protect the rights of a criminal defendant. *Glasser v. United States*, 315 U.S. 60, 71 (1942). The trial court's intervention was particularly appropriate because a defendant should not lightly decide to testify considering that the "choice to take the stand carries with it serious risks of impeachment and cross-examination, it may open the door to otherwise inadmissible evidence which is damaging to her case." *Brooks v. Tennessee*, 406 U.S. 605, 609 (1972).

The trial court's intervention was consistent with the foregoing applicable principles of law and the matter was properly resolved. The colloquy between the trial court and petitioner demonstrates that the trial court's remarks were a balanced and successful attempt to assure that petitioner had the knowledge and facts necessary to make an intelligent decision whether or not to testify. The trial court clearly stated that the decision as to whether or not she should testify was petitioner's and petitioner's alone (T. 876-877, 879).¹ At the same time, the trial court, recognizing the significance of petitioner's decision, urged petitioner to consider the advice of her attorney (T. 878-879). Following the trial court's remarks, the defense called several character witnesses. At one point during their testimony, petitioner advised the trial court that she was thinking over whether or not to testify (T. 882). At the conclusion of their testimony, defense counsel rested without calling petitioner. Seeking to make certain that the choice was petitioner's, the trial court excused the jury. The trial court then inquired directly of petitioner whether or not she was going

¹ Relevant portions of the trial transcript are included in the appendix to this brief.

to testify. Petitioner indicated that she was not going to testify.²

In sum, petitioner's contention lacks merit. By no stretch of the imagination was petitioner denied the right to be final arbiter of her defense and she suffered no deprivation of her sixth amendment right to counsel.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

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of Counsel

² A hearing on petitioner's motion to suppress evidence was conducted prior to trial. Petitioner and defense counsel disagreed at that hearing over whether or not she should testify. Following similar intervention of the trial court, petitioner testified at the suppression hearing.

APPENDIX

Trial Transcript Excerpts
(pp. 876-879, 882, 935)

(T. 876)

THE COURT: I'm just not clear, Dr. Konits. Do you intent [sic] testifying in this case?

THE DEFENDANT: I do.

THE COURT: As I have indicated on prior occasions, you as the defendant have the right to

(T. 877)

testify. You as the defendant have the right under our law to make that decision as to whether or not to testify.

Your attorney has indicated that his very best professional judgment is that you should not testify --

THE DEFENDANT: Many cases have been lost, sir, because the defendant didn't open their mouths.

THE COURT: Excuse me. I would urge you to give full consideration to Mr. Wolfe's advice.

Again I should point out to you, that depending of course, on what your testify [sic] will be it might open doors to other testimony concerning your prior conduct, other conduct that you have engaged in --

THE DEFENDANT: Alleged.

THE COURT: -- and, further, the prosector would have the right to cross-examine you and make inquiry of you

concerning various types of conduct certainly involved in this or these incidents between August 5th and 15th, 1984, as well as and in addition to other conduct that you might have involved yourself in and the jury, of course, will hear all of that.

(T. 878).

You mentioned that there have been a lot of cases where defendants have been convicted because they never said anything themselves. I would also want to indicate to you that based on my experience there have also been many, many defendants who have been convicted after they have testified and after they have been cross-examined and jurys [sic] certainly have on many, many occasions convicted such defendants.

THE DEFENDANT: Sir, I --

THE COURT: The determination --

THE DEFENDANT: Yes, I do understand you.

THE COURT: The determination, as indicated earlier on this issue, is yours.

THE DEFENDANT: Sir, I do understand.

THE COURT: However, I would finally, once again, in conclusion, urge you in the strongest terms possible to listen to, consider and, indeed, follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following my counsel's advice. I just wanted for the record to be known that I consider the People's alleged drug addicts to be on parole, totally with personal motives. You know, prior

(T. 879).

testimony -- total personal motives. That's on the record.

The second thing is that any time I have issued anything to any drug addict, right, or alleged drug addict, it has always been for the purpose of preventing an extremely high blood pressure, preventing -- the Valium slows down the --

THE COURT: I'm really not interested in your testimony. That decision again is up to you. I just wanted to make you aware of what might or might not happen, the results or implications of your testifying.

I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not testify.

All right, since there are witnesses available at this time it would seem appropriate that we should proceed.

(T. 882).

THE COURT: All right. Just so that the record is clear, obviously Mr. Wolfe has indicated, Dr. Konits, that you have reconsidered the matter and determined not to testify in the case; is that accurate?

THE DEFENDANT: Sir, I'm thinking it over.

(T. 935).

You are not to discuss it among yourselves nor with anyone else nor permit anyone to discuss it with you.

You are not visit the scene, area or premises which have been described here to you nor read any media accounts related directly or indirectly to this matter and if there is any violation of any of those admonitions please call them to my Clerk's attention as quickly as you can.

The jury will be excused. We will see you at two o'clock, if you would, please, and if you would follow my Court Officer.

(The jury thereupon exited the courtroom.)

(The following discussion was had not within the presence of the jury.)

THE COURT: All right. I take it then, Dr. Konits, that you are not going to testify?

THE DEFENDANT: No sir, I'm not going to testify.

THE COURT: All right. The People rest, Mr. DiPietro?

MR. DiPIETRO: Yes, sir.

THE COURT: All right. I'll take motions and be ready with your closing arguments then at two ***